MBF FINANCE BHD.

v.

MALAYSIA AIR CHARTER CO. SDN. BHD. & ORS.

SUPREME COURT, KUALA LUMPUR
SALLEH ABAS LP
GEORGE SEAH SCJ
SYED AGIL BARAKBAH SCJ
[CIVIL APPEAL NO. 496 OF 1986]
1 AUGUST 1987

CIVIL PROCEDURE: *Interest on judgment debt - Rate of interest payable from date of judgment - Statutory rate - Debt - Distinction between "debts" and "judgment debts".*

CIVIL PROCEDURE: *Jurisdiction - Whether Court can award interest agreed by parties - Contractual rights - Question of construing clause.*

The issue in this appeal was whether the High Court had jurisdiction to award interest in excess of the statutory rate of 8% per annum on the judgment debt.

The appellant submitted that the Court has jurisdiction to award interest at 2% per month, the rate of interest which the parties have agreed under the equipment lease agreement. However, the respondents submitted that the maximum rate of interest which a Judge is empowered to award from the date of judgment is 8% per annum. Nevertheless, the appellant was entitled to charge interest at the agreed rate of 2% per month or 24% per annum up to the date of judgment under s. 11 of the Civil Law Act 1956.

Held:

[1] Order 42 r. 12 of the Rules of the High Court 1980 specifically deals with interest on judgment debt and it reads "Every judgment debt shall carry interest at the rate of eight per centum per annum or at such other rate not exceeding the rate aforesaid as the Court directs such interest to be calculated from the date of judgment until the judgment is satisfied." That in brief was the position in Malaysia when the equipment lease agreement was executed on 20 August 1984 between the appellant as Lessor and the 1st respondent as lessee.

[2] The proviso to s. 16(1) of the Courts of Judicature Act 1964 has to be read subject to the provisions of s. 25 of the same Act.

[3] Section 16(1) of the Courts of Judicature Act clearly empowers the Rules committee to make Rules of Court to regulate interest rate on all debts including judgment debts which a Court or Judge may give subject to the 2 restrictions expressly stated in the proviso.

[4] A distinction appears to have been made by the legislature between "debts" (before judgment) and "judgment debts' (after judgment including default judgment). This division must be borne in mind when a Court or Judge is dealing with an application for interest exceeding 8% per annum on the judgment debt.

[5] The Supreme Court agreed with the learned Judge that on the true construction of Article 18(d) of the equipment lease agreement dated 20 August 1984 the appellant were not legally entitled to claim interest at 2% per month on the judgment debt as from the date when default judgment was entered but only entitled to interest at 8% per annum until full payment.

[Appeal dismissed with costs. Deposit of RM500 ordered to be paid to respondents on account of taxed costs.]

Cases referred to:
President of India v. La Pintada Compania S.A. [1985] 1 AC 104
Riches v. Westminster Bank [1947] AC 390
London, Chatham & Dover Ry Co. v. South Eastern Ry Co. [1893] AC 429
Supreme Finance (M) Bhd. v. Koo Sin Ken [1987] CLJ (Rep) 349
Damodaran v. Choe Kuan Him [1979] 2 MLJ 267
Pahang South Union Omnibus Co. Bhd. v. Minister of Labour & Manpower [1981] CLJ (Rep) 74
In re Agricultural Cattle Insurance Company [1876] 4 Ch D 34
In re European Central Railway Company [1876] 4 Ch D 33
In re Sneyd [1884] 25 Ch D 338
Economic Life Assurance Society v. Usborne [1902] AC 147

Legislation referred to:
Administration of Justice Act 1970 [UK], s. 44
Civil Law Act 1956, s. 11
Civil Procedure Act 1833 [UK], s. 28
Courts of Judicature Act 1964, ss. 16(i), 17, 25
Federal Constitution, art. 121
Law Reform (Miscellaneous Provisions) Act 1934 [UK], s. 3(1), 17
Rules Committee Ordinance 1955, s. 3, 4(g)
Rules of the Supreme Court 1957, O. 40, r. 11(1), (2), O. 42, r. 12

For the appellant - Loh Siew Cheong (Mohd. Arif Yusoff with him); M/s. Joseph Tan & Tang
For the respondents - Megat Nazirudin; M/s. Mutalib & Bakaruddin

[Editor's Note: O .42 r. 12 RHC 1980 [Sub. by P.U.(A) 445/86 w.e.f. 12 December 1986] The decision of the High Court, which led to this appeal, is reported in this issue of the CLJ at p. 772.]

JUDGMENT

George Seah SCJ:

The issue in this appeal falls within a narrow compass. It is whether the High Court has jurisdiction to award interest in excess of 8% per annum on a judgment debt?

It is admitted that every judgment debt shall carry interest. For the respondents it was submitted that the maximum rate of interest which a Judge is empowered to award from the date of judgment is 8% per annum. Learned Counsel for the appellant however, contended that the Court has jurisdiction to direct interest at 2% per month, the rate of interest which the parties have agreed.

We do not think it necessary to set out in detail the position of the Courts in England on the award of interest before judgment at common law or under statutory powers because this matter has recently been examined and reinstated extensively by Lord Brandon in giving the leading judgment of the House of Lords in the case of the *President of India v. La Pintada Compania S. A.* [1985] 1 AC 104. [see also Lord Wright's summary in *Riches v. Westminster Bank* [1947] AC 390]. It is sufficient if we summarise the position in England (as we understand it) by stating that before the Civil Procedure Act 1833 (Lord Tenterden's Act) the Courts in England could not give interest if there was an agreement to that effect express or implied or by merchantile custom. The common law position was modified by the 1833 Act and under s. 28 of that Act interest could be awarded if a debt or sum certain was payable by virtue of a written instrument at a certain time. Interest by way of damages was also allowed on all other debts or sums certain if a written demand for payment was made on the debtor giving him notice that interest would be claimed from the date of demand until

payment, but interest on damages was only allowed by the statute in a limited class of actions which we need not outline here for they do not include breach of contract. These restrictions were adversely commented upon by Lord Herchell LC in *London, Chatham & Dover Ry Co.v. South Eastern Ry Co.* [1893] ACT 429. Some forty years later Parliament enacted the Law Reform (Miscellaneous Provisions) Act 1934 and s. 3(1) of the Act attempted to deal with the problems raised by Lord Herchell LC However, on the power of the High Court to award interest after judgments the position in England appeared to be governed by the Judgments Act 1838 and s. 17 provided that "Every judgment debt shall carry interest at the rate of four pounds per centum per annum from the time of entering up the judgment ... until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment." Under the 1838 Act interest was awarded only in respect of the period from the date of settlement or realisation. The statutory rate of interest of 4% per annum on the judgment debt remained the standard rate until 20 April 1971 because by virtue of Judgment Debts (Rate of Interest) Order 1971 made under s. 44 of the Administration of Justice Act 1970 which implemented the recommendation of the report of the committee on the enforcement of judgment debts (Cmnd. 3909 (1069) para 1168), the statutory rate of interest was raised to 7½% per annum. The statutory rate has been altered several times since s. 44 came into operation n 1971, e.g.:

Since 1 March 1977	the rate of interest was 10% per annum (see Judgment Debts (Rate of Interest) Order 1977 (SI 1977 No. 141));
Since 3 December 1979	it was 12½% per annum (Judgment Debts (Rate of Interest) Order 1979 (SI 1979 No. 1382));
Since 9 June 1980	it was 15% per annum (Judgment Debts (Rate of Interest) Order 1980 (SI 1980 No. 672));
Since 8 June 1982	it was14% per annum (Judgment Debts [Rate of Interest) Order 1982 (SI 1982 No. 696));
Since 10 November 1982	it was 12% per annum (Judgment Debts (Rate of Interest) (No. 2)Order 1982 (SI 1982 No. 1427)) and
Since 1 March 1986	it was 15% per annum (Judgment Debts (Rate of Interest) Order 1985 (SI 1985 No. 437)).

We turn now to consider the legal position in Malaysia.

Prior to Malaysia day (16 September 1963) the law regulating the power of the High Court in Malaya to give interest at such rate as it thinks fit between the date when the cause of action arose and the date of judgment in a suit for debt or damages was governed by s. 11 of the Civil Law Act 1956 and O. 40 R. 11(1) of the Rules of the Supreme Court 1957. However, on Malaysia day the Rules of the Supreme Court 1957 including O. 40 r. 11(1) applied throughout Malaysia but the Civil Law Act 1956 including s. 11 was only extended to the states of Sabah and Sarawak as from April 1965. We like to point out that the provisions of s. 11 of the Civil Law Act 1956 and O. 40 r. 11(1) of the Rules of the Supreme Court 1957 are in identical terms except that under s. 11 the power is extended to all the Courts of competent jurisdiction in Malaysia whereas under O. 40 r. 11(1) it is confined only to the High Courts in Malaya and Borneo. A comparison of s. 11 and O. 40 r. 11(1) with s. 3(1) of the Law Reform (Miscellaneous Provisions) Act 1934 would appear to indicate that the wordings are substantially the same. It would not be far wrong to say that s. 11 of the Civil Law Act 1956 and O. 40 r. 11(1) of the Rules of the Supreme Court 1957 have been lifted from s. 3(1) of the Law Reform (Miscellaneous Provisions) Act 1934.

With regard to interest after judgment this was governed by O. 40 r. 11(2) of the Rules of the Supreme Court 1957 which reads:

> Every judgment for the payment of money shall bear interest at the rate of six per centum per annum.

It was common ground that the Rules of the Supreme Court 1957 were made by the Rules Committee established under s. 3 of the Rules Committee Ordinance 1955 (since repealed) and that O. 40 r. 11(2) of the 1957 Rules appeared to have been enacted under s. 4(g) of the said Ordinance which reads:

> 4. It shall be the duty of the Rules Committee from time to time and as occasion may require to make rules for the following purposes:
>
> (g) for regulating the rate of interest recoverable on debts, including judgment debts, or on the sums found due on taking accounts between parties, or on sums found due and unpaid by receivers or other persons liable to account to the Supreme Court:
>
> Provided that in no case shall any rate of interest exceed eight per centum per annum, unless it has been otherwise agreed between parties:

The position remained unchanged even after Malaysia day. However, the 1957 Rules were replaced by the Rules of the High Court 1980 made by the Rules Committee pursuant to ss. 16(i) and 17 of the Courts of Judicature Act 1964 and these 1980 Rules came into force throughout Malaysia on 1 June 1980. Order 42 r. 12 of the 1980 Rules specifically deals with interest on judgment debt and it reads:

> Every judgment debt shall carry interest at the rate of eight per centum per annum or at such other rate not exceeding the rate aforesaid as the Court directs, such interest to be calculated from the date of judgment until the judgment is satisfied.

That in brief was the position in Malaysia when the equipment lease agreement (ELA) was executed between the appellant as lessor and the 1st respondent as lessee on 20 August 1984. The remaining 2nd, 3rd, 4th and 5th respondents signed as guarantors of the ELA and all of them have been sued by the appellant in that capacity.

Reliance was placed on sub-paragraph (i) of s. 16 of the Courts of Judicature Act 1964 which reads:

> 16. Rules of Court may be made for the following purposes:
>
> (i) for regulating the rate of interest payable on all debts, including judgment debts, or on the sums found due on taking accounts between parties, or on sums found due and unpaid by receivers or other persons liable to account to the Court:
>
> Provided that in no case shall any rate of interest exceed eight per centum per annum, **unless it has been otherwise agreed between parties** (emphasis given);

The main thrust of the submission was directed at the proviso and in particular the words underlined. It was the contention of learned Counsel for the appellant that the underlined words in the proviso preserves the contractual rights of the parties and does not confer any power on the Rules Committee to interfere with interest rate which the parties have agreed. And if a party had contracted to pay interest at the rate of 2% per month or 24% per annum this rate should *prima facie* be allowed by the Court unless a statute otherwise provides. Learned Counsel for the respondents conceded for the purpose of this appeal only that the appellant was entitled to charge interest at the agreed rate of 2% per month or 24% per annum up to the date of judgment under s. 11 of the Civil Law Act 1956 but objecting to appellant claiming the same interest rate or any other rate in excess of the statutory limit of

8% after judgment had been entered. A recent decision of this Court [Lee Hun Hoe CJ (Borneo), Wan Suleiman and Syed Agil Barakbah SCJ] in the case of *Supreme Finance (M) Bhd. v. Koo Sin Ken* [1987] CLJ (Rep) 349 is cited in support of the proposition that "where a judgment is recovered in respect of debt any other personal remedy for the same debt is extinguished or merged in the judgment. In which case under O. 42 r. 12 the interest will be at the rate of 8% per annum or such other rate not exceeding 8% per annum as the Court directs from the date of judgment until satisfaction ..."

In our opinion, the proviso to s. 16(1) is to be read subject to the provisions of s. 25 of the Courts of Judicature Act 1964 which are in the following terms:

> 25(1) Without prejudice to the generality of Article 121 of the Constitution the High Court shall in the exercise of its jurisdiction have all the powers which were vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by any written law in force within its local jurisdiction.
>
> (2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:
>
> Provided that all such powers shall be exercised in accordance with any written law or rules of Court relating to the same.

Item 7 of the Additional Powers of the High Court which is contained in the Schedule reads:

> 7. Powers to direct interest to be paid on debts, including judgment debts, or on sums found due on taking accounts between parties, or on sums found due and unpaid by receivers or other persons liable to account to the Court.

As was rightly pointed out by the learned Judge in the Court below, such additional powers of the High Court are to be exercised only in accordance with any written law or rules of Court relating to the same (see the dictum of Lord Diplock in *Damodaran v. Choe Kuan Him* [1979] 2 MLJ 267 and the judgment of the Federal Court in *Pahang South Union Omnibus Co Bhd. v. Minister of Labour & Manpower* [1981] CLJ (Rep) 74.

In our opinion, s. 16(i) of the Courts of Judicature Act 1964 clearly empowers the Rules Committee to make rules of Court to regulate the interest rate on all debts including judgment debts which a Court or Judge may give subject to the 2 restrictions expressly stated in the proviso, *viz:*

> (a) in the absence of an agreement the maximum rate of interest shall not exceed 8% per annum and
>
> (b) interest rate which has been mutually agreed by the contracting parties shall remain unaffected.

In support of the claim that the appellant were entitled to 2% interest each month after judgment learned Counsel for the appellant appeared to rely on Article 18 sub-paragraph (d) dealing with late payments in the equipment lease agreement which reads:

> *Late Payments*
>
> Lessee shall pay additional interest at the rate of 2% per month on whatever sums (whether basic rent or supplemental rent) which are in arrears calculated from the date such sums are due for payment until the date of actual payment by lessee.

Learned Counsel for the appellant has referred us to a number of authorities to indicate how the Courts in England have been dealing with the interpretation of a "proviso" but on examination of these authorities we find that none of them proved to be sufficiently in point to be of assistance in the construction of the problem which we have to consider in the present appeal.

In our opinion, the issue before this Court is simply a question of construction. It seems clear from the authorities (see *In re Agricultural Cattle Insurance Company* [1876] 4 Ch D 34, *In re European Central Railway Company* [1876] 4 Ch D 33, *In re Sneyd* [1884] 25 Ch D 338 and *Economic Life Assurance Society v. Usborne* [1902] AC 147) that any agreement on the payment of interest is to be construed strictly by the Courts and the onus is plainly on the party who claims interest in excess of the statutory rate of 8% per annum.

Having considered the judgments of Cotton and Lindley LJ in the case of *In re Sneyd* (*supra*) in our opinion, the true construction of this sub-paragraph (d) is this, that interest at the rate of 2% per month shall be payable so long as any part of the basic or supplemental rent is in arrears and remains due to Article 4 of the equipment lease agreement (ELA) so as to enable the appellant as lessor to sue upon it and to enforce payment of that sum or any part thereof. So long as any part of the basic or supplemental rent or debt is due under this sub-paragraph (d) interest at 2% per month shall operate. Now, it may be technical, but it is well settled that, if there is a debt secured by a covenant, and judgment is recovered on the covenant, the debt on the covenant merges in the judgment debt. In point of law the debt or any part of the basic or supplemental rent which has been in arrears is no longer payable under the covenant, it is payable under the judgment; the covenant to pay interest at 2% per month on the debt or the Basic or Supplemental Rent which has been in arrears is gone. It is now merged in the judgment. Being a judgment debt it is governed of the ELA, by O. 42 r. 12 of the Rules of the High Court 1980 and not by sub-paragraph (d) of article 18 of the ELA. Such an interpretation would appear to be in accord with the recent decision of this Court in the case of *Supreme Finance (M) Bhd. v. Koo Sin Ken* (*supra*). At p. 350 this Court said that "after judgment, the judgment creditor enjoys the privilege of having the assistance of the Courts in enforcing the judgment or he may initiate bankruptcy proceedings. Without obtaining judgment a judgment creditor cannot do either of these."

It is said that it is a hardship upon the appellant because they are worse off by reason of their diligence in bringing the action. The short answer is that the appellant were not compelled to bring the action against the respondents; they brought it in order to obtain the advantage of an execution (see the dictum of Bramwell J.A. in *In re European Central Railway company* at p. 38 (*supra*)).

We like to point out that a distinction appears to have been made by the legislature between "debts" (before judgment) and "judgment debts" (after judgment including default judgment). This division must be borne in mind when the Court or Judge is dealing with an application for interest exceeding 8% per annum on the judgment debt.

Based on the interpretation which we have given to sub-paragraph (d) of Article 18 of the equipment lease agreement dated 20 August 1984 it would appear to follow that the appellant's case against the 2nd, 3rd, 4th and 5th respondents would also fail.

For the reasons which we have given above, we agree with the learned Judge that on the true construction of sub-paragraph (d) the appellant were not legally entitled to claim interest at 2% per month on the judgment debt as from the date when default judgment was entered but only entitled to interest at 8% per annum until full payment.

The appeal is therefore dismissed with costs to the respondents. The deposit of RM500 is to be paid to the respondents on account of taxed costs.

Also found at [1987] 2 CLJ 291